SIVAJOTHI K SUPPIAH A

v.

KUNATHASAN CHELLIAH

HIGH COURT MALAYA, JOHOR BAHRU B
AZAHAR MOHAMED JC
[ORIGINATING SUMMONS NO: 24-1876-2004(4)]
15 JANUARY 2006

FAMILY LAW: *Children - Maintenance - Application for maintenance order to be varied - Whether there was material change in circumstances - Law Reform (Marriage and Divorce) Act 1976, s. 96 -Whether defendant failed to make full disclosure of financial standing within meaning of r. 63(1) of the Divorce and Matrimonial Proceedings Rules 1980* C D

This was the defendant's application in encl. 98, *inter alia*, for the relief that the order of maintenance made by the learned judge dated 15 December 1999, in so far as it was related to the maintenance in the sum of RM5,000 per month payable by the defendant to the children, be varied and the defendant be ordered to pay a sum of RM400 a month as maintenance for Gayithiri Kunathasan Chelliah and Meera Kunathasan Chelliah with effect from 24 August 2001. To support his contention that there was material change in circumstances, the defendant relied on the following grounds (1) that since 24 August 2001, one of the three children of the marriage has been in the custody, care and control of the defendant; (2) defendant's income from his practice as an accountant had reduced significantly; (3) none of the three children were in kindergarten anymore; (4) the plaintiff had no maid and (5) the children did not take the bus to school or to other extra curricular activities as the plaintiff and the children have been residing in the same neighbourhood with the children's school since 1998. E F G

Held: H

(1) Under s. 96 of Law Reform (Marriage and Divorce) Act 1976 (the 1976 Act), there must be a material change in the circumstance in order for the court to vary or rescind any order for maintenance. The requirement in this section I

imposed a legal obligation on the defendant to prove on the balance of probability that there was a material change in the circumstances as at 24 August 2001. (para 10)

(2) Since 24 August 2001, the defendant had custody, care and control of the eldest daughter, Venothini Kunathasan Chelliah. Hence, from 24 August 2001 onwards the plaintiff had only two daughters in her custody, care and control. The order made on 15 December 1999 was on the basis that the plaintiff had all the three children in her custody, care and control. The plaintiff had one less child to maintain as of 24 August 2001. The complexion had changed significantly. The 'material change' was obvious. There has been a material change within the meaning of s. 96 of 1976 Act. The plaintiff no longer needed the maintenance payment in the sum of RM1,318 per month for the eldest daughter. (para 12)

(3) The defendant had failed to disclose his full monthly income, expenses and the market value of all his properties within the meaning of r. 63(1) of the Divorce and Matrimonial Proceedings Rules 1980. He had failed to disclose his earnings capacity and other available capital resources. The defendant had failed to make a full and frank disclosure of his financial standing and obligations to enable this court to make a determination whether there have been any material change in his income since the making of the order for maintenance dated 15 December 1999. There has been no material change in his income within the meaning of s. 96 of the 1976 Act. (paras 15 & 16)

(4) On the other grounds relied upon by the defendant that the children were not in kindergarten anymore, the plaintiff had no maid and the children did not take the bus to school or other extra curricular activities, these were friviolous and untenable grounds. The defendant had neither thought nor acted reasonably. The children were at the stage of growing up and would need new clothes and other necessities. It was the duty and responsibility of the defendant, as the natural father, to provide the children better education, medical care, tuition and extra curricular activities for their overall development, welfare and advancement. (paras 17, 18 & 19)

[The court varied the maintenance order of 15 December 1999 from RM5,000 to RM3,682 per month payable by the defendant with effect from 23 August 2001.]

Case(s) referred to:
Goh Kim Hwa v. Khoo Swee Huah [1986] 2 MLJ 156 ***(refd)***
Sivajothi K Suppiah v. Kunathasan Chelliah [2000] 3 CLJ 175 HC ***(refd)***

Legislation referred to:
Divorce and Matrimonial Proceedings Rules 1980, r. 63(1)
Law Reform (Marriage and Divorce) Act 1976, s. 96

For the plaintiff - R Thayalan; M/s TH Liew & Partners
For the defendant - Shahreen Begum; M/s Imran, Shahareen & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Azahar Mohamed JC:

[1] This is the defendant's application in encl. 98, *inter alia*, for the relief that the order of Faiza Tamby Chik J dated 15 December 1999, in so far as it relates to the maintenance in the sum of RM5,000 per month payable by the defendant to the children, be varied and the defendant be ordered to pay a sum of RM400 per month as maintenance for Gayithiri Kunathasan Chelliah and Meera Kunathasan Chelliah with effect from 24 August 2001.

[2] Before going any further, it is important to set out the factual background and the sequence of events relevant to this application. The matter arises in this way. The plaintiff is an accountant and the defendant is a public accountant and has his own accounting firm munder the name of Chelliah & Associate in Johor Bahru. They were married at the Civil Registry of Marriages in Johor Bahru on 1 November 1987 and out of this marriage three children were born:

1. Venothini Kunathasan Chelliah born on 7 February 1990;
2. Gayithiri Kunathasan Chelliah born on 2 November 1993; and
3. Meera Kunathasan Chelliah born on 24 Mac 1995.

[3] The plaintiff and the defendant have a long history of disagreements and irreconcilable differences. Sadly, the relationship came under enormous strain. It appears they distrust one another. As a result of this start of affairs, on 3 July 1997, that is to say

approximately two years after the youngest child was born, the plaintiff filed an *ex parte* originating summons in the Shah Alam High Court and obtained the following orders:

a. That the plaintiff be given immediate custody, care and control of her three children;

b. The defendant and/or his servants or agents or family members be restrained from taking possession, control or care of the three children from any place whatsoever;

c. The defendant and/or his servants or agents or family members be restrained from entering the plaintiff's house at anytime whatsoever;

d. The defendant and/or his servants or agents or family members be restrained from threatening, assaulting or harassing the plaintiff, the maid and/or the plaintiff's children in any manner whatsoever; and

e. The defendant is at liberty to apply to this Honourable Court for any variations of these orders and such application shall be heard *inter partes* by this Honourable Court.

[4] But soon, the defendant took out a summons in chambers dated 30 July 1997 and prayed for the following orders:

(i) That the order of the court dated 3 July 1997 be set aside;

(ii) That the defendant be given immediate custody, care and control of Venothini Kunathasan Chelliah, Gayithiri Kunathasan Chelliah and Meera Kunathasan Chelliah;

(iii) That the plaintiff be given reasonable access to the children.

[5] On 1 April 1998 the Shah Alam High Court dismissed with costs the defendant's application but made the following orders:

(i) That the defendant be granted weekly access to the three children namely Venothini Kunathasan Chelliah, Gayithri Kunathasan Chelliah dan Meera Kunathasan Chelliah from 3pm on Saturday to 10pm on Sunday;

(ii) The defendant be granted access to the three children for two third of the short school term holidays and the plaintiff shall have access to the three children for one third of the short school term holidays;

(iii) The defendant and the plaintiff shall each have half of the December school term holidays in respect of access to the three children; and

(iv) The plaintiff and the defendant shall arrange and confirm through their respective solicitors the place for the fetching and returning of the three children at least five days before the defendant letches and returns the three children.

[6] Going back a little, the plaintiff filed an application dated 25 March 1998 and prayed for the following orders:

(1) That the defendant pay to the plaintiff maintenance for the three children namely Venothini Kunathasan Chelliah, Gayithri Kunathasan Chelliah dan Meera Kunathasan Chelliah from 3 March 1997 till the date of filing of the originating summons No. MT1-24-376-1997 on 3 July 1997 for the sum of RM21,956;

(2) That the defendant pay to the plaintiff maintenance for the three children namely Venothini Kunathasan Chelliah, Gayithri Kunathasan Chelliah dan Meera Kunathasan Chelliah from 4 July 1997 onwards and for the future the sum RM5,489 per month; and

(3) Such further or any other reliefs as this Honourable Court shall deem fit and proper to grant.

[7] The defendant contested all her prayers. Later on, after a full trial, Faiza Tamby Chik J granted the order for maintenance on 15 December 1999 (see: *Sivajothi a/p K Suppiah v. Kunathasan a/1 Chelliah* [2000] 3 CLJ 175). According to the learned judge, and I respectfully agree with him, maintenance signify any form of material provision that will enable an adult to live a normal life and a child to be brought up properly. Thus maintenance cannot mean only mere subsistence, ie, the food she puts in her mouth but must also mean the clothes on her back, the house in which she lives and the money which she has to have in her pocket, all of which vary according to the means of the man who leaves a wife behind. Moreover, it is settled law that it is the duty of the father to maintain the standard of living the children had enjoyed in the past, ie, during the existence of the marriage. The following passage in the judgment of the learned judge at p. 79-80 of the report is of relevance to the present application (encl. 98) before me:

After perusing the written arguments and oral submissions in respect of provisions for maintenance made by both parties, I allow the following items of monthly maintenance for the three daughters. However, in reaching the final figure I round it up to a sum of RM15,000 per month for maintenance of the three daughters from 4.7.1997 onwards. For the maintenance of the daughters from 3.3.1997 to 3.7.1997, I allow a round figure of RM20, 000. The breakdown is as follow: (Final total is rounded up to RM5,000)

(a) School/education/tuition:

Children's school fees and other school related payments	
Venothini	RM 25
Gayithri	RM 280
Meera	RM 260
Pocket money for 3 children @ RM60	
Perchild	RM 180
Books/accessories/story books RM50	
Per child	RM 150
Transport costs for children to and from school	RM 300
Tuition for Mathematics & Bahasa Malaysia	
Venothini	RM 250
Gayithri	RM 150
Meera	RM 150
	RM1,745

(b) Extra-curricular activities

Vocal and dancing classes for 3 children @ RM75 per child	RM 225
Speech & drama (for Gayithri)	RM 60
Pocket money/tidbits and transport for ECA	RM 175
	RM 460

(c) Children clothing, shoe, toiletries and Toys for 3 children RM 600

(d)	Food, marketing, vitamins and medical For 3 children	RM1,500
(e)	Maid	RM 715
(f)	House rental	RM1,400
	Total	RM6,420
	Less the wife's contribution is	RM1,095
	Final total	RM5,325

The mother's summons in chambers dated 25.3.1998 is hereby alloweed as amended to a round figure of RM5,000 per month.

[8] Afterward, the defendant appealed against the order made on 15 December 1999 to the Court of Appeal. On 11 January 2005, the Court of Appeal unanimously dismissed the defendant's appeal and the order made on 15 December 1999 was upheld.

[9] Here, I should like to refer to s. 96 of Law Reform (Marriage and Divorce) Act 1976 (the 1976 Act) which provides as follows:

> The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstance.

[10] The meaning of the section is plain and very clear. It is apparent that under s. 96, in so far as it relates to the case at hand, there must be a material change in the circumstance in order for the court to vary or rescind any order for maintenance. The section says any "material change" and not simply "change". There is no ambiguity whatsoever. It means a change in an essential part. In considering whether there has been any "material change" within the meaning of this section regard must be had to all the relevant circumstances, including, in the context of the present case, the judgment of Faiza Tamby Chik J. On a proper construction, the requirement in this section does impose a legal obligation on the defendant to prove on the balance of probability that there had been a material change in the circumstances as at 24 August 2001. There is no requirement at all for the plaintiff to disprove anything.

[11] Now, the defendant is relying on the following grounds to support his contention that there is a material change in circumstances:

1. Since 24 August 2001 one of the child has been in the custody, care and control of the defendant in Johore Bahru;
2. Defendant's income from his practice as an accountant has reduced significantly;
3. None of the 3 children are in kindergarten anymore;
4. Plaintiff has no maid;
5. The children do not take the bus to go to school or other extra-curricular activities as the plaintiff and the children has been residing in the same neighborhood with the children's school since 1998;

[12] The important point to note here is that it is an undeniable fact that since 24 August 2001 the defendant has custody, care and control of the eldest daughter, Venothini Kunathasan Chelliah, who is now 15 years old. What follows thereafter is that from 24 August 2001 onwards the plaintiff had only two daughters in her custody, care and control. In this regard, more significantly the order made by Faiza Tamby Chik J on 15 December 1999 was on the basis that the plaintiff had all the three children in her custody, care and control. This means that, if up to 23 August 2001 the plaintiff had all three children in her custody, care and control, and from 24 August 2001 onwards, she had only two children in her custody, care and control, then the plaintiff has one less child to maintain as of 24 August 2001. To me, viewed from such a standpoint, the complexion has changed significantly. The "material change" is obvious. Therefore, I entirely agree with the arguments of learned counsel for the defendant on this point. For that reason, I am of the view there has been a material change in that respect within the meaning of s. 96 of 1976 Act. That is why to reflect this part of my judgment; it is my finding that the plaintiff no longer needs the maintenance payment in the sum of RM1,318 per month for the eldest daughter.

[13] With regard to the defendant's contention that his income has reduced significantly, there are several problems with this point. First, I am not at all convinced that there is any material change since the learned judge decided on the matter. In this regard, I

lay emphasis that Faiza Tamby Chik J granted the order for maintenance on 15 December 1999 after a full trial. The defendant has failed to prove any material change in his income since the order was made. Rule 63(1) of the Divorce and Matrimonial Proceedings Rules 1980 (the 1980 Rules) provides:

> An application for a variation order shall be supported by an affidavit by the applicant setting out full particular of his property and income and the grounds on which the application is made.

[14] The defendant has exhibited the following documents to support his contention that his earnings has reduced significantly:

1) Financial Statements for the period 1 September 1996 to 31 August 2002;

2) Income Tax Return Form for the year 2002;

3) Notice of Assessment of Income Tax for the years 1996, 1992 to 2003.

[15] But the main problem, to my mind, is that the defendant has failed to disclose his full monthly income, expenses and the market value of all his properties. To my mind, he has failed to set out full particulars of his property and income within the meaning of r. 63(1) of the 1980 Rules. He has failed to disclose his earnings capacity and other available capital resources. It appears that the defendant has used an overdraft facility for the purpose of investment in shares and properties. In this regard, the plaintiff in her affidavit, which was affirmed on 1 March 2005, *inter alia*, averred:

> 10. In reply paragraph 16 and exhibit KC3 of the defendant's affidavit I state as follows:
>
> (a) The defendant has deliberately declared a low income in order to justify the payment of a very low maintenance for the children. The defendant had originally declared an income of RM100,000 for the year of assessment 1996 and also declared his income of RM36,000 under my name for the same year. Subsequently he amended his declared income to RM70,830 in order to bolster his appeal in the Court of Appeal;

A

Copies of the defendant's letter to the Jabatan Hasil Dalam Negeri dated 2 August 2004 and the Borang J for the Year 1996 are annexed herewith and collectively marked as exh. "SJ5".

B

(b) The defendant's income statement is prepared by the defendant himself and not by an independent third party. Even then the declaration made is after *inter alia* deducting the following expenses:

C

i) That all utility (water, electricity, telephone) expenses in respect of his house are paid by his company and expensed out in his office accounts;

ii) That books, newspapers and periodicals are paid by his company and expensed out in his office accounts;

D

iii) That his car hire purchase installments and interest charges are paid by the company and are expensed out as depreciation and interest charges in his office accounts;

iv) The motor and traveling expenses are paid by the company and expensed out as expenses in his office accounts.

E

11. In reply to para. 17 of the defendant's affidavit I state as follows:

F

(a) The defendant has not disclosed and exhibited the full bank statements from the date the loan was first taken on the house when it was first purchased until to date. This will show the flow of funds and the purpose of the payments;

G

(b) I verily believe that the overdraft facility was used by the defendant for his various investments, some of which may not have been disclosed by the defendant to this Honourable Court;

12. In reply to paragraph 18 of the defendant's affidavit I state that the defendant had deliberately not paid his rental for the office premises and engineered the civil suit so that he can justify that he has no means to pay

H

13. Maintenance for the children that was ordered by the High Court and as affirmed and upheld by the Court of Appeal.

I

[16] After much thought and consideration to all aspects of this issue, I have made a decision that the defendant has failed to make a full and frank disclosure of his financial standing and obligations to enable me to make a determination whether there has been any material change in his income since the making of the order for maintenance of Faiza Tamby Chik J dated 15 December 1999. Accordingly, in my view, there has been no material change in his income within the meaning of s. 96 of the 1976 Act.

[17] On the other grounds relied upon by the defendant that the children are not in kindergarten anymore, the plaintiff has no maid and the children do not take a bus to go to school or other extra-curricular activities, to my mind these are frivolous and untenablegrounds. In my view, the defendant neither thought nor acted reasonably. What is most important in this connection is that although they are no longer in kindergarten they are now in primary school and naturally there will be expenses incurred. The principle of law is well illustrated in the case of *Goh Kim Hwa v. Khoo Swee Huah* [1986] 2 MLJ 156, where Siti Norma Yaakob J (as she then was) in the course of her judgment said at p. 157:

> On the issue of maintaining the two girls, the applicant had asked for $400 per month per child exclusive of all sums agreed to be expended by the respondent for their education, tuition and medical fees. I hardly expected the respondent to object to this for even if custody of the two girls had remained with him, he is expected to spend some money on them apart from their education, tuition and medical fees. However, he claims that the amount asked for is prohibitive but as a doctor, running three clinics called Clinic Chow, Petaling Jaya Polyclinic and Jinjang Clinic, he can well afford to contribute to their maintenance. In this respect, I do not consider him to be truthful when he stated that he only earned $4,000 a month with a take home pay of only $503. He needs more than just his own bare statement to convince me that his monthly gross earning is only $4,000. As I consider the sum asked for are not unreasonable, bearing in mind that the two girls are at that stage of growing up where they need new clothes and other necessities which only money can buy, and as the amount is not prohibitive to the respondent, I had also ordered that the respondent pay the applicant $400 per month per child as their maintenance, exclusive of all sums agreed to be expended by the respondent for their education, tuition and medical fees.

[18] I would respectfully agree with the views expressed by the learned judge. In the same way, in the instant case, the children are at the stage of growing up. I would say that they certainly need new clothes and other necessities. I must add that besides this, it is the duty and responsibility of the defendant, as the natural father, to provide the children better education, medical care, tuition and extra curricular activities for their overall development, welfare and advancement, which would warrant me to vary the High Court Maintenance Order, which was affirmed and upheld by the Court of Appeal on 11 January 2005.

[19] To sum it up, for the reasons given, I would only vary the maintenance order of 15 December 1999 from RM5,000 to RM3,682 per month payable by the defendant with effect from 23 August 2001. There will be no order as to costs.